No. 02-400

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, *et al.*,

Petitioners,

v.

MARIE V. LYNCH, Administratrix of the Estate of STEPHEN M. WILEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE

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QUESTION PRESENTED

Whether the Form MCS-90 Endorsement, issued with a motor carrier's liability insurance policy which policy defines "insured" to include permissive users of the motor carrier's covered vehicles, requires the insurer to pay a final judgment entered against a permissive user of the motor carrier's own vehicle.

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STATEMENT OF THE CASE

Congress enacted the Motor Carrier Act of 1980, directing the Interstate Commerce Commission ("ICC") to promulgate regulations to assure that injured members of the public have redress for the negligence of interstate motor carriers. Accordingly, motor carriers engaged in interstate commerce are required by Federal law to register with the Department of Transportation ("DOT") and provide proof of financial responsibility. 49 U.S.C. § 13901. The regulations provide that each automobile liability insurance policy issued to a motor carrier contain an MCS-90 endorsement. ("MCS-90").

The Respondents are the Administratrix's of the estates of two young men killed in a fiery crash caused by the negligence by a driver of a tractor pulling a trailer owned by the petitioner's named insured, Centra, Inc. or a subsidiary. The ownership of the trailer is not at issue. There is no question that the insurance policy covers the trailer. There is also no question that the driver, Lawrence Yob; and the tractor owner Bath Transport were permissive users of the trailer, as defined by the insurance policy. However, that insurance policy purports, by its terms, to exclude permissive users from coverage notwithstanding the MCS-90 endorsement. The MCS-90, by its terms, provides for coverage. The petitioner, however, argues that the driver, because he was not an "insured" under the insurance policy, was not covered.

The MCS-90 provides that "no condition, provision, stipulation, or limitation contained in the policy . . . shall relieve the company from liability or from payment of any final judgment." 49 C.F.R. § 387.15. Not withstanding the specific terms of the MCS-90 endorsement, the Petitioner argues that because the insurance policy excludes "truckers" who are permissive users of the trailer, the MCS-90 endorsement is

inoperative and does not provide coverage for both Lawrence Yob and Bath Transport. Petitioners arguments are directly contrary to Congress' intent in enacting the regulation.

In a nearly identical case, the Supreme Court refused to grant a petition seeking a writ of certiorari. In *John Deere Insurance Co. v. Nueva*,[1] petitioners requested that the Court consider a question virtually identical to that presented by petitioner here: Does the MCS-90 endorsement provide coverage to injured members of the public when the underlying insurance policy disallows coverage. In an Amicus Curiae Brief submitted by the Solicitor General, the United States recommended that the Court refuse to grant certiorari because the case did not merit plenary review.[2] Notwithstanding the Solicitor General's invitation to DOT to clarify the regulation[3], DOT has not yet done so. The Solicitor General notes in his brief that no party has requested either an action to clarify any putative mis-interpretation of the MCS-90, nor for any guidance at all with respect to the MCS-90.[4]

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1. *John Deere Insurance Company v. Nueva, et al.*, 534 U.S. 1127, 122 S. Ct. 1063 (Feb. 19, 2002).

2. Brief for the United States as Amicus Curiae, *John Deere Insurance v. Nueva, et al.*, filed Jan. 8, 2002. "Under these circumstances, we are not persuaded that the court of appeal's erroneous decision in the present case merits plenary review by this court." p. 19

3. *See id.* at 19 ". . . the interpretation of a form promulgated by regulation . . . could therefore be fixed through a regulatory proceeding".

4. *See id.* at 19.

A. Factual Background

On October 11, 1996 a tractor-trailer crossed the median and slammed into an automobile on the Ohio Turnpike. Both of the car's occupants, the driver Justin Reese and his passenger, Stephen Wiley, were killed. The tractor was driven by Lawrence Yob. Yob's negligence is undisputed as the cause of the crash.[5]

The tractor was owned by Bath Transport at the time of the crash. Bath Transport was covered by an insurance policy issued by American International Insurance Group, Inc. ("AIG") with a liability limit of one million dollars. Although ownership of the trailer was not clear at the time of the crash, it is undisputed that AIG also insured the trailer with a policy limit of two million five hundred thousand dollars. *See* Petitioner's brief at 5. That policy was issued by National Union Fire Insurance Company, a wholly owned subsidiary of American International Group. *See* Petitioner's brief at 41a. Both the tractor and trailer policies carried an MCS-90 endorsement as mandated by federal law. *See id.* at 3a.

The issue before the Ohio Supreme Court was whether or not the trailer policy excludes permissive users from coverage when the MCS-90 endorsement requires coverage. *See* Petitioner's brief at 1a-2a. The policy at issue provides that "we will pay all sums an "insured" legally must pay as damages" for bodily harm. The policy defines "insureds," in pertinent part, as "anyone else while using with your permission a covered auto." Petitioner's brief at 41a. The trailer is undisputedly a covered auto. The tractor driver

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5. *See* Petitioner's brief at 2a.

pulling the trailer is a permissive user. The MCS-90 Endorsement attached to the insurance policy provides that

> the insurer agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 . . .[6]

Section 387.15 defines motor vehicle to include "a land vehicle, machine, truck, tractor, trailer or semi trailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Petitioner argues that the trailer insurance policy excludes permissive users (Yob and Bath Transport) because the definition of "trucker" in the insurance policy at issue is different from the definition of "motor vehicle" as provided in the MCS-90 Endorsement. The Petitioner disregards Congress' intent when it seeks to restrict the operation of the MCS-90 Endorsement. That Endorsement allows for the definition of a "motor vehicle" to include the trailer at issue. *See* Petitioner's brief at 37.

This Court should decline to grant Petitioner's writ of certiorari. In doing so, the Court will, once again[7], give effect

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6. 49 C.F.R. § 387.15.

7. The Court denied a petition seeking grant of certiorari less than one year ago in *John Deere Insurance Co. v. Guillermo Nueva, et al.*, 534 U.S. 1127, 122 S. Ct. 1063 (Feb. 19, 2002). The issue is nearly identical to that in the instant case.

to the Congressional intent underlying the regulations that require each interstate motor carrier's insurance policy contain an MCS-90 endorsement and assure that the endorsement be given its full and intended effect.

B. Procedural Background

On January 24, 1997 Respondents Marie V. Lynch, Administratrix of the Estate of Stephen M. Wiley, and Susan Reese, Administratrix of the Estate of Justin L. Reese, filed suit in the Trumbull County Court of Common Pleas against Yob, Bath Transport, and other defendants for wrongful death. *See* Petitioner's brief at 26a. On June 17, 1998 Respondents filed an amended complaint adding AIG as a defendant, and seeking a declaratory judgment that coverage under both the tractor and trailer policies was applicable. *Id.* at 27a. The Trumbull County Court of Common Pleas found that Yob and Bath were not insureds as that term was defined under the Trailer insurance policy. *Id.* at 28a. However, the Common Pleas Court also found that the MCS-90 endorsement to the trailer policy was applicable and insurance coverage was available in the amount of two million five hundred thousand dollars. *Id.* at 29a.

Petitioners appealed that decision. *Id.* at 18a. The Eleventh District Court of Appeals reversed. *Id.* at 25a. The Appeals Court erroneously found that the MCS-90 endorsement to the trailer policy was not applicable to Bath and Yob, since they were specifically excluded from the insurance policy to which the MCS-90 was attached. *Id.* at 24a. The appellate court did not consider the Congressional policy underlying the MCS-90, namely, protecting members of the public from negligent and unsafe motor carriers.

The Ohio Supreme Court reversed. *See* Petitioner's brief at 2a. In its decision, the court relied on precedent from the Ninth and Tenth Circuits that arose from factually similar circumstances.[8] In both of those cases, the Ninth and Tenth Circuits found that an MCS-90 endorsement provides coverage to a truck driver otherwise excluded from the insurance policy, because of the policy of public protection underlying the terms of the regulation. The Ohio court found the reasoning of these cases to be persuasive. *See Lynch v. Yob, et al.*, 95 Ohio St. 3d 441, 447, 768 N.E.2d 1158 (2002), petitioner's brief p. 10a. The Ohio Supreme Court held that an "MCS-90 endorsement in a trailer owner's policy required insurer to indemnify driver as the permissive user of the leased trailer." *Id., paragraph 1, syllabus*. In addition, "the policy definition of 'insured' to exclude a trucker who was not an employee of the named insured was invalid". *Id., paragraph 2, syllabus*. The Court so held because to do otherwise would frustrate the express Congressional policy of public protection underlying the MCS-90 Endorsement. *See* Petitioner's brief at 13a.

C. Regulatory Background

To provide the driving public with protection from negligent motor carriers, Congress enacted the Motor Carrier Act of 1980[9] which requires motor carriers engaged in interstate commerce to register with the Department of

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8. *See John Deere Insurance Co. v. Nueva, et al.*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 534 U.S. 1127, 122 S. Ct. 1063 (2002) (No. 00-1491) and *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996)

9. *See* 49 U.S.C. § 10927.

Transportation. In order to meet this registration requirement, a motor carrier must meet certain minimum financial responsibility requirements.[10] The U.S. Code provides:

> The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less that suck amount as the Secretary prescribes . . . The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles . . .

See 49 U.S.C. § 13906(a)(1).

The Secretary of Transportation prescribes the appropriate form of endorsement to be attached to the insurance policy. 49 U.S.C. § 13906(f). This form is called an MCS-90 Endorsement.[11] The MCS-90 endorsement is attached to an insurance policy to show compliance with the registration and financial responsibility requirements.

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10. *See* 49 U.S.C. § 13902(a)(1)(C).

11. The MCS-90 endorsement was first required under the authority of the now-defunct Interstate Commerce Commission. *See* ICC Termination Act of 1955. The ICC regulations remain in effect under the authority of the Department of Transportation until new regulations are promulgated. *See John Deere v. Nueva*, 229 F.3d 853, 855 n.3 (9th Cir. 2000).

The policy underlying these requirements is set out at 49 C.F.R. § 387.1[12]:

> This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

Courts considering the issue have held that Congress's purpose in creating the regulatory scheme is to "assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers". *See Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 610 (5th Cir. 1989), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990)[13]

The MCS-90 provides, in pertinent part, that:

> In consideration of the premium stated in the policy to which this endorsement is attached, the

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12. 49 C.F.R. § 387.3 entitled "Minimum Levels of Financial Responsibility for Motor Carriers" applies to (a) for hire motor carriers operating motor vehicles transporting property in interstate commerce.

13. *See also Canal Insurance Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995) and *T.H.E. Ins. Co. v. Larsen Intermodal Services, Inc.*, 242 F.3d 667, 672-73 (5th Cir. 2001).

> insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, condition, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company.[14]

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will only be granted for compelling reasons". Rules of the Supreme Court of the United States, Rule 10, "Considerations governing review on certiorari". This Court found no compelling reasons in February of this year, and petitioner presents the Court with no compelling reasons now.[15] As counsel for respondent argued in the brief in opposition to a petition for certiorari in Nueva, petitioner realizes that its best chance of convincing

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14. *See* 49 C.F.R. § 387.15 Forms.

15. *John Deere v. Nueva, et al.*, 122 S. Ct. 1063 (Feb. 19, 2002).

this court to grant its petition is by pointing out a split of decisions among the Federal Appellate Circuit Courts.[16] The alleged split of authority is illusory. Petitioner cannot point to any Federal Circuit Court decisions that stand contra to the Ohio Supreme Court decision at issue here. In support of this alleged conflict among the circuits, petitioner cites many of the very same cases that the Solicitor General found to be distinguishable in his Amicus Curiae Brief for Nueva.[17]

Petitioner first argues that the court should grant certiorari to resolve a dispute among the Circuit Courts of Appeal. Specifically, Petitioner points to a putative split of authority among the Ninth and Tenth Circuits on one side, and the Third, Fifth, Eighth, and District of Columbia Circuits on the other. *See* Petition for Writ of Certiorari at 15. Next, Petitioner attempts to argue that the Ohio Supreme Court decision is incorrect, since it relied on erroneous precedent. *See id.* at 11. Finally Petitioner argues that this Court should resolve an issue involving the interpretation of Department of Transportation regulations. *See id.* at 18. However, any claimed error in interpretations can properly be resolved by the Department's own rule-making procedures. Considered in total, none of Petitioner's arguments present this Court with the compelling reason deemed necessary to merit review.

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16. *John Deere Insurance v. Nueva, et al.* Brief in Opposition to Petition for a Writ of Certiorari, filed April 25, 2001.

17. Solicitor General, Brief for the United States, *John Deere Insurance v. Nueva, et al.*, filed Jan 8, 2002 at page 14. "Petitioner contends that the decisions in this case and in Adams conflict with decisions of the Third, Fifth, Eighth and District of Columbia Circuits . . . the cases petitioner cites are distinguishable from this on in various respects."

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH HAVE CONSIDERED THE ISSUE OF THE SCOPE OF THE MCS-90 ENDORSEMENT UNDER THE FACTS OF THIS CASE.

Petitioner cites several cases in support of its argument that this court should act to resolve a split of opinion among the Circuits regarding the scope of coverage that the MCS-90 Endorsement provides to injured members of the public. Petitioner is incorrect. Only two circuits have decided the issue on facts similar to the facts of this case.[18] Both of these cases are in accord with the decision of the Ohio Supreme Court being challenged here.

A review of the cases cited as conflicting with the Ohio decision in *Lynch v. Yob*, *Deere*, and *Adams* shows that while all of them involve tractor-trailer accidents, none of them turn on the issue under consideration here. Further, of the six cases Petitioner uses to illustrate a conflict of authority, four pre-date the current Department of Transportation regulatory scheme. In addition to not reflecting current regulations, four of the six cases do not involve a dispute between members of the general public, but rather a dispute between two insurance companies over ultimate liability issues. As discussed above, even the Solicitor General's Amicus brief written for Deere,[19] which Petitioner so heavily relies on, *see id.* at 16, states that the cases Petitioner cites

18. *See John Deere Insurance Co. v. Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 1063 and *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996)

19. *See* Brief for the United States as Amicus Curiae in *John Deere Ins. Co. v. Nueva*, *cert. denied*, 122 S. Ct. 1063 (2002) (No. 00-1491), filed January 3, 2002.

are distinguishable.[20] A brief review of each of the cases illustrates that no dispute exists among the Circuits.

Petitioner argues that *Carolina Casualty Ins. v. Insurance Co. of America* is representative of the Third Circuit's holding that the MCS-90 endorsement at issue in this case cannot be interpreted to broaden the scope of coverage provided by the insurance policy to which it is attached.[21] Carolina Casualty arose from a declaratory judgment action between the lessor and insurer of a tractor-trailer and the lessee and the lessee's insurer to determine which party had ultimate financial responsibility and the primary duty to defend the truck driver involved in an accident. *Id.* at 132. The Third Circuit found that none of the ICC endorsements at issue

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20. *See* Brief for the United States as Amicus Curiae above at p. 15 "the cases petitioner cites are distinguishable". The cases to which the Solicitor General is referring are: *National Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 196 F.2d 597 (D.C. Cir. 1952); *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974); *White v. Excalibur Ins. Co.*, 559 F.2d 50 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979); *Carolina Casualty Ins. v. Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979). These cases are cited at footnote 15 in petitioners brief as supporting the proposition that these cases are in opposition to both *John Deere v. Nueva* and *Royal Indemnity.* The cases petitioner cites in footnote 15 but which the Solicitor General does not discuss are *Jackson v. O'Shields*, 101 F.3d 1083 (5th Cir. 1996) and *John Deere Ins. Co. v. Truckin' USA*, 122 F.3d 270 (5th Cir. 1997).

21. *See Carolina Cas. Ins. v. Ins. Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979). Petitioner cites this case for the proposition that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duty to defend claims . . . or to pay judgments entered against others."

altered the party's rights and duties to contribution under the insurance policies.[22]

Carolina is distinguishable from the case under consideration here for several reasons:

- Carolina Casualty involves a dispute among two insurance companies seeking to allocate ultimate liability as between themselves. In the instant case, respondents are injured members of the public which Congress seeks to protect through regulation of the motor carrier industry. Courts have found the distinction to be significant and it will be discussed below.

- In Carolina Casualty, the tractor-trailer was owned and insured as a whole by one entity and leased and insured by another. In the instant case, the tractor and trailer are separately owned and insured.

- Carolina Casualty does not provide any discussion at all regarding the proper application of the MCS-90. Rather, the endorsement involved in Carolina is the BCM-90, which is not even found in the same subpart of the regulations at issue in the instant case.[23]

First, the issue in Carolina is not whether a court should interpret the MCS-90 expansively, in order to meet the

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22. *See Carolina Cas. Insurance* at 144.

23. *See* 49 C.F.R. § 313(a)(2) regarding aggregation of insurance policies and surety bonds for motor carriers and property brokers. The MCS-90, on the other hand, is found at 49 C.F.R § 387.15, regarding only motor carriers.

expressed policy of public protection, but rather where ultimate liability should lie, as between two insurance companies. In Carolina, one company insured the lessor of a tractor-trailer, while the other insured the lessee. In Lynch v. Yob et al, the issue is whether both the tractor policy and the trailer policy should be available for recovery by member of the public injured in a collision with the tractor-trailer.

In addition to the factual differences, petitioner ignores the fact that Carolina predates the current incarnation of the MCS-90 endorsement promulgated under the rule-making authority of the Department of Transportation. The regulations discussed in Carolina are different than those currently enacted.[24] The Dot regulations are broader that those regulating the trucking industry under the ICC. *See Century Indemnity v. Carlson*, 133 F.3d 591, 599.

Finally and perhaps most importantly, courts considering the scope of coverage provided by the MCS-90 have held that in cases involving allocation of financial responsibility between two insurance companies, the policy of public protection expressed in the DOT regulation is not implicated. As one court succinctly stated, "where a case is concerned with responsibility between insurance carriers and not with the federal policy of protecting the public, ICC considerations are not determinative." [25]

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24. "In 1986, ICC regulations were substantially modified." *Jackson v. Canal Ins.*, 101 F.3d 1083, 1086.

25. *See Allstate v. Liberty Mutual Ins. Co.*, 358 F.2d 121, 123 (1976). The Court goes on to state that "a court should give effect to otherwise existing allocations of financial responsibility where the goal of protecting the injured public has already been fulfilled."

The Fifth Circuit cases petitioner cites are distinguishable from this case for similar reasons. *Jackson v. O'Shields* is a 1996 case discussing whether the MCS-90 endorsement provides coverage to an injured member of the public. *See Jackson v. O'Shields, et al.*, 101 F.3d 1083 (5th Cir. 1996). Resolution of the issue turned on whether or not a valid lease existed between the employer of the driver and the owner of the tractor-trailer involved. *Id.* at 1085. The Fifth Circuit found that since the lease had been terminated, there was no duty by the insurer of the owner to indemnify the trucking company or its employee driving the rig. *See id.* There are significant factual differences between this case and *Lynch v. Yob, et al.*:

- *Jackson* is a dispute between two insurance companies, one of whom insured the lessor who owned the tractor-trailer, and the other who insured the lessee/motor carrier.

- *Jackson* turns on the existence of a valid lease between the parties involved. In the instant case, there is no such issue.

- The *Jackson* opinion never reaches the application and interpretation of the MCS-90.

John Deere Ins. Co. v. Truckin' USA is a 1997 case from the Fifth Circuit. This is yet another case where the insurers of parties to a lease are seeking to allocate liability after a tractor-trailer accident. *See John Deere Ins. Co. v. Truckin' USA, et al.*, 122 F.3d 270 (5th Cir. 1997). Here, the company insuring the owner of the rig and the insurer of the lessee of the rig, who provided the driver, sought to determine which company had the duty to defend and indemnify the driver.

Id. at 272. The Fifth Circuit found, in pertinent part, that the MCS-90 imposed no duty on the part of one insurer to defend or indemnify another insurer under the facts of this case. *Id.* at 275. Again, this case is significantly different from *Lynch v. Yob, et al.*:

- Truckin' is a dispute between two insurance companies. *Lynch v. Yob* is an action by an injured member of the public seeking to hold the insurer of a trailer liable for the negligence of the trailer's driver.

- In Truckin', the scope of the MCS-90 endorsement is not discussed in terms of whether the court should interpret it as expanding the insurance policy definition of an insured, but rather the discussion involves the duty one insurer owes to another for indemnification.

Contrary to petitioners assertion that this case supports the position that the MCS-90 does not expand coverage provided to injured members of the public, the Fifth Circuit states that "where an insurance policy does not provide coverage . . . except to third party members of the public through operation of the Endorsement (the MCS-90), the policy provides no coverage for purposes of disputes among insurers." *See id.* at 275. This statement seems to imply that the fifth circuit not only recognizes that insurer versus insurer cases are different than those involving members of the public, but that the MCS-90 does act to provide additional coverage, where the victim is a third party member of the public.

The final case petitioner cites from the Fifth Circuit is *White v. Excalibur Insurance*, 599 F.2d 50 (1979). In *White*, the estate of a truck driver killed in an accident is seeking to recover from the motor carrier who employed him. *Id.* at 51. The Court held that the MCS-90 does not provide coverage to the driver, even though he was a passenger in the truck at the time the accident occurred. *Id.* at 55. Instead, the estate's recovery was limited to worker's compensation benefits. *Id.* at 51.

- White is a worker's compensation case, turning on the issue of whether or not an employee who is a passenger in a leased tractor-trailer may recover from both the lessor and lessee's insurance policies. In *Lynch v. Yob, et al.*, Yob's negligence caused the accident. There is no question that Yob was an employee of Bath Transport, hauling the trailer insured by petitioner.

- White, in common with Carolina, predates the current DOT regulations. As discussed above, the current DOT regulatory scheme is broader than the prior regulations.

- White does not discuss the MCS-90 in the context of separate insurance policies on a tractor and a trailer, but rather whether an employee of a trucking company who leased a truck can seek recovery for harm suffered when the truck the employee was a passenger in was involved in an accident.

The case petitioner cites from the Eighth Circuit, *Wellman v. Liberty Mutual*, 496 F.2d 131 (1974), to illustrate a split between the appellate courts on the scope of the MCS-

90 endorsement is distinguishable as well. The issue on *Wellman* turns on who is liable to provide recovery when the driver was hauling freight on a return trip without the owner's knowledge or consent. *Id.* at 135.

- Like *Carolina* and *White*, discussed above, the ICC regulations discussed in Wellman pre-date the current DOT regulatory scheme at issue in *Lynch v. Yob*.

- The issue in *Wellman* is whether an insurance policy covers the owner/driver of a tractor-trailer, when the owner/driver leased the truck to the insured. The issue in *Lynch v. Yob* is whether the policy on the trailer is available to provide recovery for the driver of the tractor-trailer's negligence.

- The scope of coverage provided by an MCS-90 endorsement is not discussed at all. In *Lynch v. Yob, et al.* the scope of coverage provided by the MCS-90 endorsement is key to the determination of whether or not the trailer policy provides coverage to the driver of the tractor to which the trailer was attached.

Petitioner cites the DC Circuit as opposing the decisions of the Ohio Supreme Court, and the Ninth and Tenth Circuits regarding the scope of coverage the MCS-90 provides in *National Mutual Ins. v. Liberty Mutual Ins.*, 196 F.2d 597. Nation Mutual is another dispute between two insurance companies, each seeking to "bow the other through the courtroom door first".[26] The insurer of the owner/driver of a tractor-trailer seeks indemnity from the lessee's insurer after an accident. *Id.* at 598.

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26. *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 130 (3d Cir. 1978).

- *National Mutual* predates the current DOT regulatory scheme. The current DOT regulations at issue in *Lynch v. Yob* are broader than those at issue in National Mutual.

- *National Mutual* is an insurer versus insurer case. As discussed above, the policy of public protection underlying the MCS-90 at issue in *Lynch v. Yob* is not implicated in disputes between two insurers.

- *National Mutual* provides nc discussion of the public policy implicit in the MCS-90. In *Lynch v. Yob*, the Congressional policy of public protection underlying the MCS-90 was key to the Ohio Supreme Court decision which is being appealed here.

In sum, all of the cases which petitioner cites as illustrative of a dispute between the Federal Appellate Courts are distinguishable from the case under consideration here. There are however, two cases nearly on point both on the issue and the facts. Both *John Deere* and *Adams* support the Ohio Supreme Court's decision in *Lynch v. Yob*.

II. THE OHIO SUPREME COURT DECISION IN *LYNCH v. YOB* GIVES PROPER EFFECT TO THE MCS-90 ENDORSEMENT.

The Ohio Supreme Court determined that when a tractor and trailer are involved in an accident and separately owned and insured, the insurer of the trailer cannot exclude a permissive user from coverage as a "trucker" when the trailer insurance policy has an attached MCS-90 endorsement. Both the tractor policy and the trailer policy are available to provide

potential recovery to the injured party.[27] This decision reflects the policy of protecting members of the public from the negligence of motor carriers expressed by Congress in the regulation itself.

Interpreting insurance policies are matters of state contract law. *See T.H.E. Insurance Co. v. Larsen Intermodal Services*, 242 F.3d 667.[28] State courts are also required to interpret and apply questions of federal law.[29] When a court is required to interpret a statute, Ohio law requires that the Court determine the underlying intent expressed by Congress in enacting the law.[30] The Ohio court found, in accord with other courts considering the issue, that the purpose underlying the MCS-90 endorsement is that expressed in the text of the regulations itself: to provide protection to the public from the negligence of motor carriers. The Court therefore held that "Coverage is available on a trailer under a federally-mandated MCS-90 endorsement to an insurance policy even

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27. It is well-settled at law that a tractor and trailer involved in an accident are considered to be one entity, and therefore both the insurance policy on the tractor and the policy on the trailer are available for recovery. *See Bluebird Body v. Ryder Truck Rental*, 583 F.2d 717 (1978). This is true without regard to which part of the unit was actually involved in the accident. *See also Contrans, Inc. v. Ryder Truck Rental*, 836 F.2d 163, 165 (1987).

28. *See also Prestige Casualty v. Michigan Mutual.*

29. *See, e.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275-76 (1997).

30. "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute". *Featzka v. Millcraft Paper Co.*, 62 Ohio St. 2d 245, 247 (1980).

th ugh the operator of the rig was not an insured under the terms of the trailer's main policy and even though there was no claim that the trailer owner was negligent."[31]

In making its determination that the MCS-90 provided coverage under the facts of this case, the court relied heavily on the federal appellate decisions in *John Deere v. Nueva* and *Adams v. Royal Indemnity.*

- Like *Nueva* and *Adams*, the parties in the instant case are injured members of the public seeking redress from an insurance company attempting to avoid liability.

- Like *Nueva* and *Adams*, the federally-mandated MCS-90 endorsement in the instant case contains language that limits an insurance company's ability to deny coverage to permissive users.

- Like *Nueva* and *Adams*, neither *Yob* nor *Bath Transport* are insured under the trailer policy

- Like *Nueva* and *Adams*, *Yob* and *Bath Transport* were permissive users of the trailer.

- In *Nueva* and *Adams*, the Ninth and Tenth Circuit Courts held that although the owners of the tractors at issue were not named insureds under the respective insurance policies, they were permissive users. Since they were permissive users, the MCS-90 expanded the definition of insured to provide them coverage. Similarly, in the instant case, the Ohio Supreme Court

31. *See Lynch v. Yob, et al.*, 95 Ohio St. 3d 441, syllabus.

> found that since Yob and Bath Transport were permissive users of the trailer, the MCS-90 expanded the definition of insureds under the policy, and negated the provision in the policy that limited coverage to only those permissive users who were not truckers.

John Deere v. Nueva, 229 F.3d 853 (9th Cir. 2002), *cert. denied*, (2001) arose out of an accident involving a tractor trailer and a bus. The injured bus driver sought to recover from the uninsured truck driver, the owner of the truck, and the insurer of the trailer, even though there was no allegation that the trailer owner was negligent. John Deere Insurance, attempting to avoid having to indemnify the trailer owner, argued that while the driver of the tractor-trailer was a permissive user under the terms of the insurance policy, he was not an "insured" because the trailer was not a covered auto. The trailer policy contained an MCS-90 endorsement as required by law.

The Ninth Circuit found that the driver was an insured and therefore coverage was provided under the trailer policy. The Court found that the purpose of the MCS-90 endorsement is to ensure injured members of the public are able to obtain judgments from negligent motor carriers. *See John Deere*, 860. The court found that the MCS-90 language, stating that "no condition, provision, stipulation, or limitation contained in the policy" can relieve the insurer from paying any final judgment, operated to overcome the express exclusion of the driver from coverage as an insured. Since the driver was a permissive user of the trailer, the driver was an insured under the policy John Deere issued.

Adams v. Royal Indemnity Co., 99 F.3d 964 (10th Cir. 1996) involves a similar factual situation, this time with a tractor pulling a borrowed trailer. Royal, the trailer's insurer, sough to avoid indemnifying the driver by claiming the driver was expressly excluded from coverage as an insured under the trailer policy. The trailer policy had an attached MCS-90 endorsement. The Tenth Circuit found that while the MCS-90 does not define "insured", it does act to "indirectly modify" the terms of the underlying policy. The MCS-90 must be interpreted in this manner, because to do otherwise would "subvert the purpose" of the endorsement. In addition, the court found that by deleting the terms of the insurance policy which were inconsistent with the expressed policy purpose of public protection inherent in the MCS-90, the insurer is forced into the role mandated for it by Congress. *See id.* at 971. This role is to provide protection of the public from negligent motor carriers.

Like *John Deere* and *Adams*, *Lynch v. Yob* involves a policy of insurance on a trailer where the driver of the tractor attached to the trailer is a permissive user of the trailer. The insurance policy excludes truckers like Yob from coverage under the trailer insurance policy. Otherwise, Yob would be covered as a permissive user of the trailer. Although the Ohio Supreme Court found there were some factual differences between these cases and *Lynch v. Yob*, 95 Ohio St. 3d 441, 447, the court agreed with the reasoning behind the decisions.[32] The court held that "the MCS-90 endorsement should be read to eliminating clauses in the underlying policy

32. In arguing the Ohio Supreme Court decision is incorrect, Petitioner cites contrary decisions by state courts, *see* Petitioner's brief at footnote 16. The Ohio Supreme Court properly determined that these state appellate cases were less persuasive than the federal circuit appellate cases.

restricting the scope of coverage." *See id.* The court cited John Deere and stated that finding the driver to be an insured in this situation allows the MCS-90 to serve the "purpose it was expressly designed to serve, modifying a policy to ensure the availability of insurance for negligently injured members of the public.[33]

III. THE DEPARTMENT OF TRANSPORTATION MAY PROMULGATE ANY NECESSARY CHANGE IN THE INTERPRETATION OF THE REGULATION WITHIN ITS OWN RULE-MAKING PROCEDURE. THE DEPARTMENT OF TRANSPORTATION HAS NOT PROMULGATED ANY CHANGES IN ITS RULES.

The proper forum for any necessary clarification of DOT rules and regulations is the agency's own rule-making procedure. The DOT has not made any rule changes, even after this Court refused to grant a petition seeking certiorari in *John Deere v. Nueva*, notwithstanding the Solicitor General's invitation to do so. *See* Amicus Brief at 19.

The appropriate rule-making procedure is set out at 49 C.F.R. § 389.31. This regulation provides that "Any interested person may petition the Administration to establish, amend, or repeal a rule." As the Solicitor General noted in the Amicus Curiae Brief, requested by the Court in *John Deere v. Nueva*, the opinion of the United States was that John Deere's petition seeking a writ of certiorari need not be granted because of the DOT rule-making procedures already in place. *See Amicus Brief for John Deere v. Nueva* at 19. However, there is no evidence that anyone has

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33. *See Lynch v. Yob* at 449, referring to *John Deere* at 860.

petitioned DOT to clarify any potential misinterpretation of the MCS-90. Nor is there any evidence that DOT is considering bringing about a rule-making proceeding on its own. The implication of DOT's inaction is, of course, that DOT is satisfied with the status quo. By taking no action, DOT is in effect affirming the Ninth and Tenth Circuit decisions in *John Deere v Nueva* and *Adams v. Royal Indemnity*, as well as the Ohio Supreme Court decision under consideration here.

Allowing the Department of Transportation to make any necessary clarifications concerning the possible scope of the MCS-90 through its prescribed rule-making procedures is a valid means to resolve any alleged misinterpretations of the Department's rules and regulations. Rule-making allows governmental agencies to "function efficiently and correct their own errors." *See Weinberger v. Salfi*, 95 S. Ct. 2457, 2467 (1975).

Petitioner argues that attempts to petition DOT through its rule making procedures would not be "expeditious" in this case. *See* Petitioners brief at 18. A mere argument that allowing a Federal Agency to act or not act "would not be expeditious" should be insufficient to justify taking away the power to clarify its own rules, when such power was vested in the agency by Congress. In one case, a court responding to a contention that administrative procedures should not be followed when to do so would be fruitless said that "where plaintiffs have failed even to initiate the established administrative proceedings . . . (the Court) cannot blithely accept the plaintiff's contention that the rule-making procedure will not come to fruition, especially since the plaintiffs . . . have not deemed it worthwhile to participate

(in the rule-making procedure)." *See De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 82 (D.C. Ill. 1981). While the Court's statements were based on a factually distinguishable case, its language is equally apt here. Petitioner complains of the misinterpretation of a DOT rule, yet has not sought a clarification of that rule from the DOT, apparently because Petitioner finds it would "take too long" to do so. Like plaintiffs in *De La Fuente*, petitioner has not yet even tried to allow DOT to clarify its own rule. Perhaps petitioner fears the result.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request the Court to decline to grant the petition seeking writ of certiorari.

Respectfully submitted,

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